D Giannoulopoulos, *Improperly Obtained Evidence in Anglo-American and Continental Law* (Oxford: Hart Publishing, 2019), 328pp., hardback, £65.00, ISBN: 9781849463829.

This book provides a comparative analysis of the exclusion of improperly obtained evidence across a number of legal systems, criss-crossing jurisdictional boundaries in a lively and engaging manner. Giannoulopoulos's objective is stated clearly from the outset. In the Preface, he invites courts and legislatures within the Anglo-American and Continental legal systems to review, in the light of his comparative analysis and normative conclusions, their national solutions to problems associated with the exclusion of improperly obtained evidence. Importantly, they are further encouraged to ensure that rights considerations are given due weight. The obvious vehicle for the proposed "reinvigoration of the rights thesis" in Europe is the European Court of Human Rights and an important part of the book is concerned with assessing the court's role in building a rights-based consensus.

Giannoulopoulos starts by explaining how exclusionary rules apply in the jurisdictions considered in this work. Accordingly, as well as comparing the procedural sanction of *nullity* in France to *exclusion* in England and Wales, we are introduced to the rules of the Greek legal system. In chapters 2 and 3, the position as to exclusionary rules for evidence obtained in breach of the right to privacy in Greece is compared with that in the United States, and the law in England and Wales is compared with France. These jurisdictions represent the 'four comparative pillars' of the book and Giannoulopoulos challenges the common view that they can be characterised simply as adopting either 'free proof' or 'exclusionary' approaches to the law of evidence. His study also reveals that there are unexpected convergences between Anglo-American and Continental legal systems, but also divergences within the same legal culture.

It has long been the case in England and Wales that evidence obtained illegally or improperly is admissible if it is relevant, subject to a residual discretion to exclude for unfairness. Giannoulopoulos finds a similar but more robust discretionary approach in France, where the right to privacy coincides with the right to legal assistance (p.121). Accordingly, he suggests that the divide between adversarial and inquisitorial legal cultures is exaggerated, but also regrets that this 'hands-off' approach focuses on reliability rather than rights considerations. This is contrasted with the position in the United States and Greece, where a more 'principled' rights-based approach to exclusion applies. Giannoulopoulos concludes that there remains a considerable difference of opinion across these jurisdictions as to the correct approach to evidence obtained in breach of privacy rights, but also detects "surprising convergences" (pp.124-5). This, he suggests, is due to the constitutionalisation of criminal procedure, which has the capacity to generate a "cross-cultural, rights-centred exclusionary rule convergence" that undermines the notion that Anglo-American and Continental traditions are irreconcilable (p.122).

Chapter 4 considers how improperly obtained confessional evidence is treated and Giannoulopoulos also senses that there is an "emerging consensus" here, but this time across all four of his 'comparative pillars'. He attributes this to "a growing realisation of the importance of custodial interrogation rights and the risks inherent in the use of potentially unreliable evidence" (p.125). He explains that France has enjoyed "nothing short of a revolution in criminal procedure" (p.133) in relation to the police interrogation phase (the *garde á vue*). This has resulted in courts adopting a 'rights-based approach' without the previous need to establish some other prejudicial effect. By way of contrast, the automatic exclusionary rule in the United States, which was founded on constitutional rights and the renowned Supreme Court decision in *Miranda v Arizona* 384 US 436 (1966), has been

weakened by a succession of decisions such as *Berghuis v Thompkins* 560 US 370 (2010) (p.142).

The picture in England and Wales is described as "mixed" because the power to exclude evidence is more often than not a matter of judicial discretion provided for by s.78 of the Police and Criminal Evidence Act 1984 (PACE), rather than the mandatory exclusion under s.76. It is observed that the courts apply a high threshold for oppression that is reserved for rare cases of extreme police misconduct and, it can be added, the court's focus is firmly on the effect on the defendant rather than the breach of rights, e.g. *Heibner* [2014] EWCA Crim 102. Likewise, in cases concerned with breaches of the PACE Codes of Practice, the emphasis is on whether compliance would have made any difference to the outcome. Giannoulopoulos suggests that, notwithstanding the unfortunate decline of *Miranda* rights, this approach is still likely to send "shivers down the spine" of lawyers in the United States (p.150).

The normative foundations for Giannoulopoulos's project of persuading Anglo-American and Continental legal systems to take rights seriously, as exemplified by *Miranda*, are addressed in chapter 6. Ashworth's 'protective principle' is the "key normative foundation" for the claim that legal systems should place renewed emphasis on the protection of rights (p.215). It is argued that this provides a strong normative foundation for exclusion of evidence in a wide range of situations. However, it is also acknowledged that the 'rights thesis' is not comprehensive and gaps, for example where third parties act unlawfully, may be 'plugged' by alternative normative theories that value 'judicial integrity'. Accordingly, Giannoulopoulos proposes a 'rights (plus integrity) thesis', which may be characterised as employing the 'rights thesis' as the senior partner and theories of judicial integrity (p.223)[1] as assistants. A full account of these is beyond the scope of the book, but it is evident that the 'rights thesis' is

[1] E.g. A. Duff et al, *The Trial on Trial, Volume 3*: *Towards a Normative Theory of the Criminal Trial* (Oxford: Hart Publishing, 2007).

preferred due to the "simplicity of its logic" and because it is associated with the constitutional and human rights that Giannoulopoulos considers fundamental (p.212).

This normative account might, perhaps, have been expected earlier in the book, but Giannoulopoulos's conception of "reinvigorating the rights thesis" is that, first and foremost, this is to be generated from analysis of case law. It is present in the emerging rapprochment he detects between Anglo-American and Continental law on the exclusion of confessional evidence and, in particular, in respect of custodial interrogation rights considered in chapter 5. This reflects on how the movement towards a common understanding coincides with developments in the European Court of Human Rights. Giannoulopoulos contends that there have been "tectonic shifts" in both EU legislation and Strasbourg case law in relation to custodial interrogation rights (p.164) and addresses the important jurisprudence flowing from the Grand Chamber judgment in *Salduz v Turkey* (2009) 49 EHRR 19.

It is explained that the unanimous judgment in *Salduz* provided, on the basis of the art 6(3)(c) right to legal assistance, for an "absolute, rights-based, categorical exclusionary rule for confessional evidence obtained during custodial interrogation without access to a lawyer" (p.168). Giannoulopoulos notes that the use of such evidence was held to "irretrievably prejudice the right to a fair trial" and amount to automatic violation of art 6, except where there were compelling reasons for the interview. This is described as Strasbourg's "big *Miranda* moment"' (p.172) but, as Giannoulopoulos concedes, despite the considerable '*Salduz* jurisprudence' that followed, the longevity of the rule was "put in doubt" by the Grand Chamber's judgment in *Ibrahim v United Kingdom* (2015) 61 EHRR 9.

It was held in *Ibrahim* that failure to provide custodial interrogation rights should not amount to an automatic breach of art 6 but, rather, should be assessed more broadly as part of the 'overall fairness' of the trial. However, Giannoulopoulos contends that this underestimates the

categorical nature of the *Salduz* rule. He joins with the concurring judges in *Dvorksi v Croatia* (2016) 63 EHRR 7, [Oll-16] in comparing the breach to how some infringements of a fair trial were described in *Arizona v Fulminante* 499 US 279 (1991) as "structural errors" because they affect the very integrity of the trial and strike at the fundamental values of the society. Although that analysis has been subject to criticism in the United States,[2] it appears helpful here, as it reflects the fundamental nature of the right to counsel (*Gideon v Wainwright* 372 US 335 (1963)) and its importance for the Grand Chamber in *Salduz*.

In the light of cases decided since publication, which are considered briefly here, it is clear that Giannoulopoulos's doubts about the longevity of *Salduz* were fully justified. He hoped that the Court would distinguish *Ibrahim* and limit its effect to terrorism cases but, as the concurring judges noted in *Beuze v Belgium* [2019] 47 BHRC 147, the significance of *Ibrahim* now extends well beyond those exceptional, context-specific restrictions. It includes situations, similar to those in *Salduz*, where there is systematic statutory restriction on the right of access to a lawyer of a general and mandatory nature. Accordingly, although the facts of *Beuze* were more akin to *Salduz* than *Ibrahim*, it was the latter that was followed. Therefore, it appears that the Grand Chamber has, in effect, overruled *Salduz* and abandoned its 'bright-line' rule for art 6 in favour of an approach that weighs up the 'overall fairness' of a trial, taking into account the wider public interest and reliability of the evidence.

In what purported to be further clarification of *Salduz*, the Grand Chamber in *Beuze* reiterated ([142]-[150]) the two-stage test that it had utilised in *Ibrahim* for assessing whether a restriction on access to a lawyer is compatible with the right to a fair trial. According to this test, a court determines at the first stage whether, exceptionally, there are "compelling reasons" for restricting access to legal advice. At the second stage, the court assesses the impact of the

[2] E.g. C. J. Ogletree Jr., "Comment, Arizona v Fulminante: the Harm of Applying Harmless Error to Coerced Confessions" (1991) 105 Harv. Law Rev. 152.

restriction on the overall fairness of proceedings. However, surprisingly, the Grand Chamber held that an absence of "compelling reasons" does not lead necessarily to the finding of a breach of art 6(3)(c) and prevent progression to stage two, as the reasons seem to be only relevant to the allocation and level of proof. That is, the presence of "compelling reasons" leads to a "holistic assessment of the fairness of the entirety of the proceedings", while their absence results in "very strict scrutiny" of the overall fairness assessment, with a rebuttable presumption of unfairness. The onus is placed on the government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the proceedings was not irretrievably prejudiced by the restriction on access to a lawyer.

Giannoulopoulos argues that the Grand Chamber in *Ibrahim* misconstrued rather than clarified both "the letter and spirit" of the *Salduz* judgment (p.181) and, arguably, the "hollowing out" of "compelling reasons" in *Beuze* has exacerbated the problem. Further, as "the weight of public interest" is among the "non-exhaustive list of factors" to be considered when examining proceedings as a whole, it is also apparent that the test allows governments two opportunities to make public interest arguments, which unfairly tips the test in their favour.[3]

As well as approving the two-stage test in *Ibrahim*, the Grand Chamber in *Beuze* repeated its interpretation of art 6(3) to the effect that these rights are subsidiary aspects of the overall right to a fair trial, rather than "ends in themselves" (at [121-[122]) and concluded that denial of legal assistance would not amount to automatic violation of art 6. The Grand Chamber also employed the same analysis of art 6 in *Correia de Matos v Portugal* (2018) 44 BHRC 319. However, in a strong dissenting opinion in *Murtazaliyeva v Russia* (2018) 47 BHRC 263, 320 Judge Pinto de Albuquerque has criticised the "wishy-washiness" of this interpretation, which

[3] R. Goss, "The Undermining of Art 6 ECHR" in P. Czech, L. Heschl, K. Lukas, M. Nowak & G. Oberleitner (eds), *The European Yearbook on Human Rights 2019* (Cambridge: Intersentia, 2019), 311.

he argues "fully divests" art 6 of its meaning. That is, by ignoring its "internal structure",[4] the Grand Chamber has wrongly interpreted art 6 as providing a single 'omnibus' right, which is merely exemplified by paragraphs (1)-(3). Arguably, this treats the paragraphs as if they were akin to 'explanatory notes' rather than a collection of related, but distinct, independent rights. Moreover, this interpretation also overlooks the fact that the text of art 6(3) refers expressly to a number of "minimum rights", which Judge Pavli stated in *Einarsson v Iceland* (2020) 70 EHRR 3, [Ol-24] should not be "forced-fed into a less-than-transparent meat grinder labelled the overall fairness of proceedings". Indeed, it is submitted that a plain reading of the Convention indicates these are particular rights, rather than just aspects of a general fairness right, as is apparent from the official French version of the Convention (*tout accusé a droit notamment á*).

Giannoulopoulos contends that the law of improperly obtained confessional evidence was left in a "perilous state" due to the Grand Chamber in *Ibrahim* 'backtracking' on *Salduz* (p. 196). However, this 'backtracking' has only gained pace since publication and, indeed, the concurring judges in *Beuze* described the position as amounting to a "counter-revolution" against *Salduz* (at [25]). It may also form part of what Fenwick has described as the strategic "appeasement" of the Strasbourg Court's critics in national jurisdictions in order to avoid the derailment of the European Convention.[5] For example, no breach of art 6 was found in *Doyle v Ireland* (2019) 51979/17 despite the applicant not being permitted to have a lawyer present in over five days of police interviews, during which he was pressured to confess to murder. The applicant did not expressly request the presence of a lawyer during questioning, but this was, presumably, because it was police practice at that time to decline any such requests. As a

[4] R. Goss, "Out of Many, One? Strasbourg's Ibrahim Decision on Article 6" (2017) 80(6) M.L.R. 1137, 1141-3.
[5] H. Fenwick, "Enhanced subsidiarity and a dialogic approach – or appeasement in recent cases on criminal justice, public order and counter-terrorism at Strasbourg against the UK?" in K.S. Ziegler, E. Wicks and L. Hodson (eds.), *The UK and European human rights: a strained relationship?* (Oxford: Hart Publishing, 2018) 213.

result of these restrictions he was only able to communicate with his lawyer before or after the interviews for a total of 42 minutes, despite being interviewed on 23 occasions over 31 hours. The Irish Supreme Court in *DPP v Doyle* [2018] 1 IR 1 had dismissed reference to *Miranda* principles as irrelevant to the "very different factual and legal context" in Ireland (at [36]-[37]) and in Strasbourg it was concluded that, despite the absence of any "compelling reasons" for restricting access to legal advice, the overall fairness of the trial had not been irretrievably prejudiced.

Similarly, in *Simeonovi v Bulgaria* (2018) 66 EHRR 2 the partly dissenting judges accused the majority of "turning a blind eye" to the accused's human rights and legitimating the "legal black hole" in which an applicant could be detained for an unspecified length of time, with no right to legal assistance and in the absence of "compelling reasons" (at [Ol-2] and [Ol-33]). The applicant was detained for a full three days without access to legal advice, despite repeated requests, and the Government was unable to prove that he had been informed of his basic rights. The Grand Chamber rejected the applicant's argument that it was implausible that a defendant, accused of murder and armed robbery, had not been questioned during these three days and found no breach of art 6. Regrettably, such cases are reminiscent of the pre-PACE days in England and Wales, when suspects would disappear into police stations without access to legal advice, for hours and sometimes even days on end.[6] If the Strasbourg Court cannot find such detentions to be in breach of art 6(3) one is left wondering, like Judge Pinto de Albuquerque in *Murtazliyeva v Russia* (2018) 47 BHRC 263, 336 quite where this watering down of defence rights will stop.

In light of this recent case law, the prospects have diminished for the cross-jurisdictional, *Salduz*-style rights-based exclusionary rule for which Giannoulopoulos argued. Strasbourg

[6] E.g. P. Maguire, *My Father's Watch* (London: Fourth Estate, 2008).

jurisprudence now seems to parallel the 'backtracking' on *Miranda* principles in the United States and any convergence between legal systems appears to be not on the basis of the 'rights thesis' but, rather, an approach that focuses on the reliability of evidence. As Jackson observes, this can be regarded as a vindication of the common law approach, although the Strasbourg Court appears to remain committed to supporting rights that promote defence participation in criminal proceedings in a manner that the common law would not recognise.[7]

Giannoulopoulos concludes that even if the 'rights thesis' is in retreat, there are still reasons to be optimistic due to the strength of its simple and compelling logic (p.212). In addition, despite the rejection of *Salduz* in previously sympathetic jurisdictions, such as New Zealand and Ireland, he finds a hopeful "note of resistance" in the dissenting opinions (p.240). No doubt, post-publication, he will have found further comfort in the powerful and persuasive dissents in *Beuze v Belgium* and *Doyle v Ireland*. In any event, he should feel satisfied that the cosmopolitan legal thinking and comparative analysis in this book helps clear a way for the 'constitutionalisation' of criminal evidence at some point in the future.

Richard Glover

Wolverhampton Law School

[7] J.D. Jackson, "Common Law Evidence and the Common Law of Human Rights: Towards a Harmonic Convergence?" (2019) 27(3) Wm. & Mary Bill Rights J. 689, 713.